BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RALPH W. WELLS	)	
Claimant	)	
VS.	)	
	)	Docket No. 208,668
BOEING COMPANY	)	
Respondent	)	
AND	)	
	)	
KEMPER INSURANCE COMPANIES	)	
Insurance Carrier	)	

ORDER

Claimant appeals from the Award dated July 27, 1998, entered by Administrative Law Judge John D. Clark.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Frederick L. Haag of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are set forth in the Award. The transcript of the March 19, 1996 Preliminary Hearing was not listed in the record considered by the Administrative Law Judge. Although the submission brief of claimant includes the March 19, 1996 Preliminary Hearing with attached exhibits as part of the record, there was no stipulation to the preliminary hearing proceedings and/or exhibits being considered. The respondent and insurance carrier's submission brief does not recite the record but does refer to the preliminary hearing transcript in support of its "Statement of Facts." The Appeals Board will consider the testimony given at the March 19, 1996 Preliminary Hearing but will not consider as part of the record for this review the medical records and reports which were admitted as exhibits for the preliminary hearing.

ISSUES

In its Application for Review, claimant described the issues as:

1. Whether Claimant's work duties permanently aggravated his condition subsequent to the specific trauma occurring December 5, 1995;
2. The proper injury date;
3. Whether Claimant is limited to benefits for medical treatment, and not entitled to benefits for permanent partial disability, all pursuant to Boucher v. Peerless Products, 21 Kan. App 2d 977;
4. Nature and extent of Claimant's permanent partial disability.

Respondent denies claimant satisfied the requirements of K.S.A. 44-501(c) and further denies timely notice, timely written claim and accidental injury arising out of and in the course of employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Award shows the alleged accident date is October 5, 1995 and each and every day through December of 1997. Claimant's submission brief to the ALJ described date of accident as an issue but alleged personal injury by accident occurred on October 5, 1995 and each working day thereafter until June 1997. Respondent's submission brief to the ALJ describes the nature of the case as one where there was an original accident on October 5, 1995, but after the respondent raised the Boucher[1] defense, the claimant asked for and was granted leave to amend the accident date. At the conclusion of claimant's regular hearing testimony, counsel for claimant announced that the appropriate date of accident would begin October 5, 1995 and continue each and every working day through June of 1997. Counsel for respondent objected to any amendment of the original October 5, 1995 alleged date of accident. Thus, even though the ALJ listed the alleged accident date under the stipulations, it is clear that date of accident remained an issue.

Claimant testified that on October 5, 1995 he was pulling a web off of a wheel-well panel. It was stuck and when he jerked it he smacked his right elbow on a steel beam.

Claimant notified his supervisor, Kevin Moore, that same day but did not ask for medical treatment until later. Claimant testified that the same day that his injury occurred on or about October 5, 1995 he voted on his contract and went out on strike until right before Christmas. Claimant did not seek medical treatment until after he came back off of strike. He was sent to Boeing Central Medical on January 2, 1996, which then referred him to Dr. J. Mark Melhorn.

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[1] Boucher v. Peerless Products, Inc., 21 Kan. 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

Following a preliminary hearing, respondent was ordered to provide claimant with a list of three names from which claimant selected Dr. Harry A. Morris for treatment.

Claimant admits that except for the time he was on strike and not working, he continued with his same job throughout the period in question building wheel-well panels for the 757 airplanes. This involved lifting and assembling parts and the use of hand and power tools. Claimant described lifting drill plates weighing 85 to 90 pounds and panels weighing 105 pounds. Using rivet guns that weigh approximately 22 pounds, he would pull 500 fasteners per panel.

Claimant first testified that his arm was in constant pain after October 1995 until his job was changed to the fin shop where he is a nonworking lead. That occurred in June of 1997. He said that up until June of 1997 the condition in his right arm remained about the same. Claimant then testified that he was taken off his regular job right after Christmas, approximately January of 1997. Then claimant testified that between October 1995 and June of 1997 his arm got worse "because I had to physically work, you know, pounding rivets and, you know, picking up heavy objects."

Claimant finally testified that from June of 1997 through Christmas of 1997 he was working "putting in wire bundles and smaller stuff as that." Then around Christmas of 1997 his job changed to "a paper pusher." The condition stabilized and stayed about the same after June of 1997.

The only time claimant lost from work because of his accidental injury is time he missed for medical treatment. He described seeing Dr. Melhorn probably a half-dozen times and Dr. Pedro A. Murati once or twice.

Respondent argues that because K.S.A. 44-501(c) applies to this claim, claimant is only entitled to his medical expenses. The Appeals Board disagrees.

Claimant received ongoing medical care and missed work due to his injury for medical treatment. Therefore, claimant argues, this constitutes being disabled one week from earning full wages as required by K.S.A. 44-501(c) and claimant is entitled to receive permanent partial disability benefits because the "period of at least one week" refers to wages earned, not days missed, and these need not be consecutive full days.

At the time of claimant's injury, the statute provided in pertinent part:

> Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.

In Boucher v. Peerless Products, Inc., 21 Kan. 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996), the court found K.S.A. 44-501(c) to be plain and unambiguous that compensation to an injured employee is limited to medical expenses if the employee is not disabled for at least one week from earning full wages at the work for which he or she is employed.

After claimant's injuries, K.S.A. 44-501(c) was amended to delete the above-quoted section. K.S.A. 1996 Supp. 44-501(c). This amendment provided that it was to be applied to injuries that occurred prior to April 4, 1996, the effective date of the amendment, unless the claim had been fully adjudicated. K.S.A. 1996 Supp. 44-501a.

In Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. ___ (1997), a case involving the retroactive application of the amended section of 44-501(c), the Court of Appeals held, *inter alia*: "In workers compensation cases, the law in effect at the time of the injury governs the rights and obligations of the parties." 23 Kan. App. 2d 868, Syl. ¶ 8. Thus, the 1996 amendment to K.S.A. 44-501(c) had prospective application only and did not apply to this claimant's claim for compensation.

The Appeals Board concludes that claimant was disabled for more than one week from the work he was doing at the time of his accident because he was placed in an accommodated job due to restrictions from the accidental injury. Thus, he was disabled from the work he was doing when he was injured. Also, claimant did not receive full wages for the time he missed work while seeking medical treatment. Missing work for medical treatment related to the accident is equivalent to being disabled from earning wages. As such, claimant is entitled to receive an award for disability benefits.

Claimant was sent to physiatrist Pedro A. Murati, M.D., by his attorney for an independent medical evaluation and rating. Dr. Murati's report from that December 22, 1997 examination was made a part of the record by the stipulation of the parties. Dr. Murati's impression was right carpal tunnel syndrome, severe right ulnar cubital syndrome and severe medial epicondylitis. He recommended work restrictions based on an eight-hour day, including occasional heavy grasping with the right upper extremity, no flexion greater than 90 degrees of the right elbow, and no riveting or vibratory use of the right hand. These restrictions were described as "permanent until the patient reaches MMI." Although Dr. Murati did not consider claimant to have reached maximum medical improvement, and instead recommended further testing and treatment, he went ahead and rated claimant as having a 10 percent permanent impairment to the right upper extremity for carpal tunnel syndrome, a 10 percent impairment to the right upper extremity for ulnar cubital syndrome, and he agreed with Dr. Morris' rating of 5 percent for right epicondylitis. These ratings combined to a 23 percent impairment of the right upper extremity according to the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment.

Although claimant's counsel selected Dr. Murati for an independent medical examination and both claimant and respondent agreed to the admission of his report, it appears that neither agreed with his assessment that claimant had not reached maximum medical improvement. Insofar as can be ascertained from the record, no additional medical treatment was provided or offered to claimant by respondent and claimant elected to proceed to a final award without seeking additional treatment. Claimant represents his condition to be permanent.

The only physician deposed was orthopedic surgeon Harry A. Morris, M.D. Dr. Morris testified that he saw claimant on only one occasion, that being May 15, 1996. His impression was that claimant had medial epicondylitis. According to Dr. Morris, this condition is generally caused by repetitive type activities but can also occur from a single blow to the elbow. The history given to him by claimant was of a single incident. Claimant did not describe any worsening of his condition from continued employment. Based upon that history, Dr. Morris attributed claimant's condition to the original injury as described and did not attribute any worsening or aggravation from claimant's subsequent work activities. In his opinion, claimant would have a 5 percent permanent impairment of function under either the Third Edition, Revised, or Fourth Edition of the AMA Guides. Dr. Morris did not diagnose carpal tunnel syndrome or ulnar cubital syndrome. He gave claimant the option of living with the symptoms or having surgery, but if claimant did not desire surgery then he was at maximum medical improvement. Dr. Morris did not impose any additional restrictions on claimant's work activities other than "what he already had." However, neither Dr. Morris' records nor his testimony reflect what restrictions claimant already had. As Dr. Murati's report and "release to return to work" form had already been introduced into evidence by the time of Dr. Morris' deposition it may be that he was referring to those restrictions but this is not clear. The record does not reflect what, if any, restrictions were recommended by Dr. Melhorn. Although claimant's job changed and that change has been described as an accommodation, the record does not reflect what or whose restrictions were being implemented by that accommodation.

The report by Dr. Murati contains a history whereby claimant related that his work was aggravating his injury but Dr. Murati does not give his opinion concerning a date or dates of injury or whether claimant suffered a permanent worsening of his condition after October 5, 1995. His restrictions would suggest that the type of work claimant was doing on that date would tend to aggravate his condition but the record is not clear as to whether claimant continued to perform that same heavy work for very long after returning from the strike and the Christmas holidays. Accordingly, the Appeals Board finds that claimant has failed to prove any permanent aggravation of his condition after October 5, 1995.

The Appeals Board finds claimant gave timely notice of accident. Claimant's testimony is uncontroverted that he reported to his supervisor, Kevin Moore, that he injured his right elbow by striking it on a steel beam on the same day as that accident. On January 2, 1996, which was shortly after his return to work, claimant went to Central

Medical and filled out an accident report. Thereafter claimant received authorized medical treatment through Dr. Melhorn.

Although respondent's counsel represented to claimant and to the Court that it would present the testimony of claimant's supervisor, Kevin Moore, and that he would testify claimant never reported his accidental injury to him, and although the Court left the preliminary hearing record open for the requested time for respondent to depose Mr. Moore, that deposition was never taken. No such deposition is a part of the regular hearing record either and was apparently never taken. The Board may make a negative inference from his failure to testify.

The Appeals Board also finds claimant suffered accidental injury arising out of and in the course of his employment on October 5, 1995. Not only is claimant's testimony uncontroverted in this regard but it is corroborated by a coworker, Robert Winkler.

An Application for Hearing was filed with the Division on January 22, 1996. The Appeals Board finds this is within 200 days of the October 5, 1995 date of accident. Therefore, written claim was timely.

The Appeals Board finds the testimony of Dr. Morris to be the most persuasive and adopts his diagnosis and rating. Claimant's complaints at the time of his examination were consistent with a diagnosis of medial epicondylitis but not with the diagnosis of carpal tunnel syndrome and ulnar cubital syndrome found by Dr. Murati. Furthermore, Dr. Murati's diagnosis was couched in terms of the patient not having reached MMI and with a recommendation for additional testing to "document any entrapment neuropathy at the ulnar cubital tunnel." Hence, the ulnar cubital syndrome diagnosis does not appear to be more probable than not based upon a reasonable degree of medical certainty. Therefore, claimant is entitled to an award of permanent partial disability compensation based upon the 5 percent loss of use of the right upper extremity due to medial epicondylitis.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated July 27, 1998 should be, and is hereby, modified and an award for compensation is entered as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ralph W. Wells, and against the respondent, Boeing Company, and its insurance carrier, Kemper Insurance Companies, for an accidental injury which occurred October 5, 1995, and based upon 10.5 weeks at the maximum rate of $326 per week, for a 5% scheduled injury to the

arm, making a total award of $3,423.00 all of which is currently due and owing and is ordered paid in one lump sum less any amounts previously paid.

Respondent and its insurance carrier are ordered to pay all reasonable and related medical expenses.

Future medical is awarded upon proper application to and approval by the Director.

An unauthorized medical allowance of up to $500 is awarded upon presentation to respondent of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Deposition Services	
Transcript of regular hearing	$139.50
Transcript of stipulation	33.40
Deposition of Harry A. Morris, M.D.	99.10

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Frederick L. Haag, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director